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CHARLES ELMORE

Supreme Court of the United States.

October Term, 1935.

No. 602.

New York Life Insurance Company,

Petitioner,

v.

Demetrios P. Viglas,

Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

1. The Jurisdictional Point was Properly Presented by the Demurrer.

On page 2 of the respondent's brief it is argued that, since he sought large damages in good faith, the demurrer could not properly have been sustained. This argument is based upon the theory that, where more than $3000 is claimed in good faith, the fact that less may be ultimately recovered is immaterial as far as the jurisdiction is concerned. In support of this proposition the respondent cites *Kimel* v. *Missouri State Life Insurance Co.*, 71 Fed. (2d) 921 (C.C.A. 10th), and *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22. Neither of these cases has any application to the present case. In the *Kimel* case three causes of action were declared on. The first was for $50 per month as disability benefits from September, 1925, to January, 1932,

amounting in all to $3750; the second was for the present value of $50 a month during the plaintiff's life expectancy; and the third was for premiums paid amounting to some $1500. The defendant had moved that the case should be dismissed for want of jurisdiction. This motion was patently unfounded in view of the perfectly reasonable claim for $3750 and consequently was properly denied. The case could apply to the present situation only if the sole cause of action declared on had been the second for recovery of the expectancy. That was not the case before the court and was not the point considered by the court.

In the case of *The Fair* v. *Kohler Die & Specialty Co.* jurisdiction was asserted under the patent laws. The plaintiff was a resident of the same state as the defendant and could have had no other ground (p. 24). The case does no more than hold that there is jurisdiction though the defendant denies the merits.

It is well established that, where the plaintiff's own pleading discloses that less than the jurisdictional amount is recoverable, the case is not within the jurisdiction of the Federal courts.

> *Vance* v. *W. A. Vandercook Company*, 170 U.S. 468, 472:
>
> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum."

That is the precise situation presented here. The petitioner contends that it appears from the face of the declaration

that less than $3000 is legally recoverable. In view of that situation the Court had no jurisdiction. The case on this point is the same as if the plaintiff declared upon a bond in the penal sum of $1000, attached a copy of the bond to his declaration, and claimed damages in the sum of $4000. No such claim could give jurisdiction.

Wilson v. *Daniel,* 3 Dall. 401, 407, Ellsworth, C. J.:

> "The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

This is quoted with approval in—

Barry v. *Edmunds,* 116 U.S. 550, 560.

Suppose the plaintiff declared on one note for $1000 past due and another note for $3000 due in the future. Would the Federal court have jurisdiction?

2. The Nature of the Alleged Disability does Not Change the Situation.

The respondent refers in his brief to the fact that the disability alleged was the irrecoverable loss of the use of a hand and foot (see respondent's brief, pp. 3, 5, 9). By this he apparently intends to argue that the allegation—

> "The plaintiff says he lost the total and irrecoverable use of one hand and one foot" (R. p. 5)—

fixes the liability of the petitioner to pay disability benefits for his entire life, and so avoids the position taken by the petitioner that disability benefits only accrue with the passage of each completed month of disability. The argument is based upon the provision in the policy that—

> "The total and irrecoverable loss . . . of the use of . . . one hand and one foot shall constitute total disability for life" (R. p. 20).

But the continuance of this disability rests upon prophecy quite as fully as any other disability. The allegation that the loss is "irrecoverable" is one of prophecy. The company's assertion that for some time past the respondent had not been continuously totally disabled was an assertion that he had recovered at least partial use of hand or foot. It is quite as possible to recover from such a disability as from any other, and the insurer must have an equal right to contest the point without being charged with repudiation of the policy. The situation presented is not that which would arise if the allegation had been that one hand and one foot had been severed. The allegation refers only to the use.

3. The Claim of Hardship on the Respondent.

The respondent repeatedly refers to the great hardship which might be forced upon an insured by requiring him to

litigate repeatedly the question whether he is in fact totally disabled. He bases this argument very largely upon the proposition that the lapse of the policy declared by the petitioner was "unconditional." No situation raising any such hardship as he suggests is presented upon this record. That situation necessarily proceeds upon an assumption that an insurer is acting in bad faith. There are no allegations in the declaration suggesting any such position by this petitioner. Obviously a policyholder is not to be required to bring suit each month over a period of years, but quite as obviously nothing is shown here suggesting that the petitioner seeks to force him to do so.

The statement that the lapse was "unconditional" is not included in the declaration. That was something thrown in by the Circuit Court of Appeals in its opinion. The allegation is simply that the respondent—

> "declared the policy as lapsed upon its records, the premiums not having been waived by the defendant nor paid by the plaintiff" (R. p. 6).

Clearly this was a declaration under the terms of the policy. The policy specifically provides that the insured within six months after default in payment of the premiums may be reinstated by furnishing proof of continuous disability for at least three months since the default:

> "In event of default in payment of premium after the Insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default" (R. p. 20).

Furthermore, the policy provides that the effect of lapse, if the policy is not restored under the above clause without payment of premium, or reinstated with payment of premium upon evidence of insurability (R. p. 21), is simply that the policy is not maintained in force beyond the date when the payment became due, "except as to the benefits provided for herein after default in premium payment" (R. p. 24). These benefits are the surrender values stated for the election of the insured. If he makes no election, the policy is continued automatically as temporary insurance from the date of default for such term as the value will purchase (R. p. 23).

The Circuit Court of Appeals was wrong in construing a simple allegation that the company "declared the policy as lapsed upon its records" as meaning "a complete termination of it and a denial by the defendant of any further liability on it" (R. p. 15).

Upon receiving the notice of the lapse, paying the premium under protest was not the only course open to the respondent. He could file proof of disability under the clause just quoted; he could bring a bill in equity to restrain the company from lapsing the policy; he could sue under the state declaratory judgment statute for a declaration that he was totally disabled; and, further, a judgment in an action to recover disability benefits accrued on August 11 would be *res judicata* that the policy did not lapse on August 7.

On the allegations of the present declaration there is nothing to show that more than one proceeding in court would be required to establish the respondent's rights. The hardship referred to in his brief is entirely imaginary. The law would be able to give relief if compensation were wilfully and contumaciously withheld.

Cobb v. *Pacific Mutual Life Insurance Co.*, 51 Pac. (2d) 84 (Calif. S.C.).

4. The Respondent's Authorities.

On page 6 of the respondent's brief four state court cases are cited as showing that there may be anticipatory breach. The citation of *Robbins* v. *Travelers Ins. Co.*, 269 N.Y.S. 841, is of the decision of the special term. The case was appealed to the Appellate Division, which dealt with it solely on the ground that the pleadings showed a cause of action only for the accrued benefits—241 App. Div. 350. The opinion of the special term is not authority. The case of *Milburn* v. *Royal Union Mutual Life Ins. Co.*, 234 S.W. 378, was expressly overruled by the Missouri Court of Appeals, which decided it in the later case of *Allen* v. *National Life & Accident Co.*, 67 S.W. (2d) 534, 535. The case of *Indiana Life Endowment Co.* v. *Reed*, 103 N.E. 77, contains much discussion of the point and decides that the evidence showed no repudiation of the policy. The case of *Equitable Assurance Society* v. *Pool*, 71 S.W. (2d) 455 (Ark.), is the only case cited which sustains the respondent's point. It is submitted that that case is wrong. The Federal case of *Minnesota Life* v. *Marshall*, 29 Fed. (2d) 977 (C.C.A. 8th), wrongly cited as "79 F. (N.D.) 977," is concerned with an entirely different point.

The final draft of the American Law Institute's Restatement of the Law of Contracts is clearly contrary to the respondent's contention. Sec. 318 (*e*):

> "The doctrine of anticipatory breach is not extended to unilateral contracts unless the promisor's duty is conditional on some future performance by the promisee. . . . There must be some dependency of performances in order to make anticipatory breach possible."
>
> "Illustration 9. A in consideration of $500 then paid to him by B promises B that on the further payment by B on the first day of the following May of $10,000

A will transfer Blackacre to B. Before that day A sells Blackacre to C. A has committed an anticipatory breach of contract.

(The reason is that B ought to be freed from the necessity of keeping his $10,000 ready)

"Illustration 10. A in consideration of $10,000 then paid to him by B promises B to transfer Blackacre to B on the first day of the following May. Before that day A tells B that he will not transfer the land as promised. Since the contract is unilateral, A has not committed an anticipatory breach of contract."

The respondent treats *Pierce* v. *Tennessee &c. R.R. Co.*, 173 U.S. 1, and *Parker* v. *Russell*, 133 Mass. 74, as authorities for holding that upon a contract to pay during life, subject to the promisee's condition from time to time in the future, an action may be maintained to recover future damages contingent upon a future breach. The Circuit Court of Appeals likewise misapplied these cases. In them there was nothing contingent about the obligation. The only contingency was as to the length of time through which the plaintiff would live (see petitioner's brief, pp. 11, 12). It is to be noted that the headnote in the *Pierce* case is not exact. The written contract sued on, which superseded the previous oral promises, was a promise to pay for life, not during disability. There is a clear distinction between an absolute contract to pay for life or to pay an annuity and a contract to pay $20 in August, 1966, provided the promisee has been continuously disabled until that time. In the present case the obligation for each future month is contingent upon the future disability. In the *Pierce* and *Parker* cases the only contingency was the amount of damage, that is, the length of the life.

The situation is much the same as in a case where the contract is to make payments to the promisee "while he

is sober and well behaved." In that situation a breach justifies recovery only to the date of the writ. The existence of the condition of sobriety prevents the recovery of future damages.

Fay v. *Guynon,* 131 Mass. 31.

So also with the alimony cases. The condition that payments are due only while the plaintiff remains unmarried prevents present recovery for future instalments.

Dunbar v. *Dunbar,* 190 U.S. 340, 346.
Linton v. *Linton,* 15 Q.B.D. 239.

The respondent appears to take comfort from the fact that this Court denied certiorari in the *Rascoe* case (273 U.S. 722). There can be no justification for this position. This Court has many times stated that denial of a petition for certiorari does not mean approval of the opinion of the lower court. Moreover, in this particular instance it seems clear that no other course was open to this Court but to deny the petition. The *Rascoe* case was tried without a jury, and the judge did not make separate findings. This was pointed out in the opinion. The court stated that—

> "Without such separate findings of facts, neither the evidence nor the question of law presented by it is reviewable by this court" (12 Fed. (2d) 695).

This was likewise noticed in the reference to the case in *Kithcart* v. *Metropolitan Life Insurance Co.,* 1 Fed. Supp. 719, and in *Wyll* v. *Pacific Mutual Life Insurance Co.,* 3 Fed. Supp. 483, 484. The point presented upon this record was not properly presented in the *Rascoe* case, and there was no occasion for this Court to decide a point not open on the record simply because the majority of the Circuit Court of Appeals for the Sixth Circuit had seen fit to do so.

The notion that a life insurance policy may be subject to the doctrine of *Roehm* v. *Horst,* 178 U.S. 1, is a grave menace when, as in the *Rascoe* case, the policy contains a total and permanent disability clause. The company is under a duty to repudiate a policy when, for example, the policy is obtained by substituting for a moribund applicant a healthy person to be examined, or by fraud in the application, or when the policy was not accepted and paid for during the applicant's lifetime. These are common examples of utter renunciation. If the jury believe the applicant, a verdict and judgment for outrageous "damages" may follow.

On the other hand, if a life insurance contract alone is repudiated, it makes no important difference to the company whether the insured prevails on the theory of present damages or merely establishes the validity of the policy, because the damages would be the present worth of the face of the policy less the present worth of the premiums payable during the insured's expectancy. The plaintiff would rather have specific performance than damages. Hence the question rarely arises.

It arose and was wrongly decided in—

Aetna Life Insurance Co. v. *Geher,* 50 Fed. (2d) 657 (C.C.A. 9th)—.

a case which illustrates the point of this discussion. Three educational endowment policies of $1000 each were issued on a father's life for the benefit of his child, the policies maturing at the end of 17, 18, and 19 years, respectively. Upon his previous death, they were not to be paid before maturity, but in that event the future proceeds would be doubled. The insured died before receiving the policies. The company refused to register the policies as effective, contending that they never came into force. Here was a total repudiation of a definite future obligation wholly unilateral, since the trial judge found that they were effec-

tive and that no premiums were due because the agent who was indebted to the applicant had promised to pay the first premiums. Upon those findings there ought to have been a decree in equity or a declaratory judgment establishing that the policies were effective, and that $6000 should be payable at maturity. But the Circuit Court of Appeals misapplied the doctrine of *Roehm* v. *Horst,* 178 U.S. 1, ignored the contrary state decisions (see citations in *Cobb* v. *Pacific Mutual Life Insurance Co.,* 51 Pac. (2d) 84), and allowed the child's guardian to recover at once as "damages" the present value of $6000 discounted at 7%, the legal rate, thus frustrating the purpose of the insured, injuring the child, and giving the company a benefit for which it had not contracted. The result cannot be supported. However, it has no application to the case at bar. The money was absolutely due, though payable in the future. Here no money will be due, even in the future, unless the respondent during each month shall be alive and continuously permanently disabled.

Under the combination policies the idea that repudiation may result in enormous future damages is a serious menace. (In *Wyll* v. *Pacific Mutual Life Insurance Company,* 3 Fed. Supp. 483, $180,000 was the sum claimed.) It is worthy of consideration by this Court. Although there is no repudiation here, the First Circuit Court of Appeals has encouraged the belief that every repudiation of such a combination policy is an invitation to sue in the Federal court for a lifetime of payments.

Respectfully submitted,

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